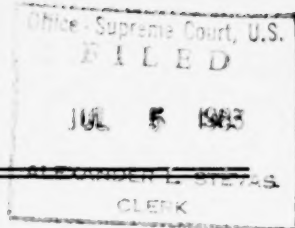


83-46

No.



In The
Supreme Court of the United States
October Term, 1982

KIZZIER CHEVROLET CO., INC., OF SCOTTSBLUFF,
NEBRASKA, and DWAYNE KIZZIER,

Petitioners,

vs.

GENERAL MOTORS CORPORATION,
OLDSMOBILE DIVISION,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT**

ROBERT G. SIMMONS, JR. of
WRIGHT, SIMMONS & SELZER
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1620 Avenue A, P. O. Box 629
Scottsbluff, Nebraska 69361

Attorney for Petitioners.

QUESTION PRESENTED FOR REVIEW

Should the Court of Appeals order use of the Nebraska Declaratory Judgment of Nebraska law statute (Nebraska Statutes 24-219 to 24-225) (Appendix D, P. App. 45) (enacted after this matter was briefed in the Court of Appeals) to determine Nebraska law, when the determination of the issues depends solely upon the meaning of Nebraska statutes 60-1420 to 60-1422 (Appendix E, P. App. 48) which has never been considered by a Nebraska Court?

This is a suit for damages for breach of contract occurring while General Motors Corporation unsuccessfully proceeded in Nebraska administrative proceedings and courts to terminate the contract (established by the Nebraska Supreme Court in *S & T Motors v. General Motors Corp.*, 203 Neb. 188, 277 N. W. 2d 701 (1979). The United States District Court here held that General Motors did not have to comply with such contract while it unsuccessfully proceeded before a Nebraska administrative body, and Nebraska courts.

The decision of the Court of Appeals in this matter is based upon an acceptance of the Trial Court's determination of Nebraska law, when, as the Court of Appeals found, the Nebraska State Courts had not decided this issue, the Court of Appeals stating at 705 F. 2d, p. 328 (Appendix A, P. App. 1):

"After careful review, we conclude that it is unclear from the language of the applicable statutes whether Nebraska law requires a franchisor to give effect to a contract for a change in ownership immediately or whether the franchisor may await the action of the licensing board upon the franchisor's application to terminate that franchise. * * *

In light of these two possible constructions, we defer to the district court's interpretation on this issue. In doing so, *we recognize that the issue is a close one, and that a construction contrary to that of the federal district court might have been reached by a state court.*

In sum, we defer to the district court on this issue of state law."

This problem was not discussed in the briefs of either party, nor in oral argument.

After the filing of briefs in this Court, a new Nebraska statute (effective date July 17, 1982), Nebraska Statutes 24-219 to 24-225 CS 1982 (Appendix D, P. App. 45) provides that the Nebraska

"Supreme Court may answer questions of law certified to it by * * * a Court of Appeals of the United States * * * when requested by the certifying court, if there are involved in any proceeding before it questions the law of (Nebraska) * * * which may be determinative of the cause then pending in the certifying Court as to which it appears to the certifying Court there is no controlling precedent in the decisions of the Supreme Court of (Nebraska)."

This Court will not be asked to determine Nebraska law. This Court is being petitioned to direct use of such a state procedure for determination of state law when the Court of Appeals finds that the issue of state law is "*a close one, and that a construction contrary to that of the Federal District Court might have been reached by a state court*".

PARTIES OF THIS ACTION

The only parties to this proceeding are the Plaintiffs and Appellants, Kizzier Chevrolet Company, Inc., of Scottsbluff, Nebraska, and Dwayne Kizzier, and this Defendant and Appellee, General Motors Corporation, Oldsmobile Division.

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Petitioners,

vs.

GENERAL MOTORS CORPORATION,
OLDSMOBILE DIVISION,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT**

OPINIONS DELIVERED BY THE COURTS BELOW

The opinion of United States District Judge, Warren K. Urbom, rendering judgment for Defendant is unreported and appears as Appendix B hereto. The opinion of the Court of Appeals is reported at 705 F. 2d 322, and appears as Appendix A hereto. The order denying Petition for Rehearing is without opinion, and appears as Appendix C hereto.

GROUND'S FOR JURISDICTION

The opinion and order of the Court of Appeals affirming the judgment of the District Court was entered April 22, 1983. A timely Petition for Rehearing was filed, and denied on May 18, 1983. Petition for Certiorari was filed within 90 days of that date. The Order denying the Petition for Rehearing is printed herein in Appendix C, at page App. 44. This Court has jurisdiction under 28 USC 1254(1).

STATUTES INVOLVED

Nebraska Statutes 24-219 to 24-225 CS 1982. See Appendix D hereto.

Nebraska Statutes 60-1420, 60-1421 and 60-1422, R. R. S. 1943. See Appendix E hereto.

STATEMENT OF THE CASE

S & T Motors (a partnership) (herein referred to as S & T) had been for 25 years the Oldsmobile dealer for General Motors Corporation (herein referred to as GM) in Scottsbluff, Nebraska. The business building of S & T exploded on May 4, 1977, making it impossible to continue in business as required by its franchise contract with GM. In lieu of trying to rebuild, etc., S & T sold, on May 11, 1977, to Plaintiff, Kizzier Chevrolet Company, Inc., of

Scottsbluff, Nebraska (herein referred to as Kizzier) the Oldsmobile "Franchise" and other items.

After some delay GM applied to the Nebraska Motor Vehicle Industry Licensing Board under Nebraska statutes for permission to terminate GM's Franchise Contract with S & T. After Nebraska administrative proceedings and appeals, the Nebraska Supreme Court in *S & T Motors v. General Motors Corp.*, 203 Neb. 188, 277 N. W. 2d 701 (1979) held that the S & T Franchise Contract with GM was not terminated and belonged to Kizzier. GM then complied with the Franchise Contract then owned by Kizzier. GM did not comply with its Franchise Contract from the date of the sale (May 11, 1977) until September 19, 1979.

This suit is a suit for damages sustained by Kizzier during the period May 11, 1977 to September 19, 1979, and thereafter, for failure of GM, in the period involved, to comply with the Franchise Contract of delivering to Kizzier Oldsmobile motor vehicles to sell.

The Nebraska statute involved (60-1420, R. R. S. 1943) (Appendix D, P. App. 45) reads:

"No franchisor shall terminate or refuse to continue any franchise unless the franchisor has first established * * * the franchisor has good cause for termination or non-continuance."

This was interpreted by the Trial Court (Appendix B, P. App. 18 hereto) to mean that GM (the franchisor) did not have to continue and perform its S & T Franchise Contract (then the property of Kizzier) while GM was unsuccessfully proceeding to try to terminate the Franchise Contract for good cause. No Nebraska court decision so held or passed upon this question.

The Court of Appeals (Appendix A, P. App. 1 hereto) refused to review the determination of the Trial Court as to the meaning of Nebraska statute 60-1420, R. R. S. 1943, saying:

"After careful review, we conclude that it is unclear from the language of the applicable statutes whether Nebraska law requires a franchisor to give effect to a contract for a change in ownership immediately or whether the franchisor may await the action of the licensing board upon the franchisor's application to terminate that franchise. • • •

In light of these two possible constructions, we defer to the district court's interpretation on this issue. In doing so, *we recognize that the issue is a close one, and that a construction contrary to that of the federal district court might have been reached by a state court.* (Emphasis added.)

In sum, we defer to the district court on this issue of state law."

After decision of the United States District Court, and after this matter was completely briefed on appeal to the Court of Appeals, the Nebraska Legislature enacted (effective July 17, 1982) Sections 24-219 to 24-225 CS (1982 (Appendix D, P. App. 45 hereto) providing:

"• • • Supreme Court may answer questions of law certified to it by • • • a Court of Appeals of the United States • • • when requested by the certifying court, if there are involved in any proceeding before it questions the law of (Nebraska) • • • which may be determinative of the cause then pending in the certifying Court as to which it appears to the certifying Court there is no controlling precedent in the decisions of the Supreme Court of (Nebraska)."

On Petition and Motion for Rehearing, the Court of Appeals was requested to use the new Nebraska statutes,

which request was denied in its order (Appendix C, P. App. 44 hereto).

ARGUMENT

This Court Has Ordered The Court of Appeals to Ask State Courts To Decide State Law

The issue on Petition for Certiorari is whether this court should grant certiorari to hear the issue of whether the new Nebraska declaratory judgment of law procedure should be used to ascertain state law.

This court has heretofore granted certiorari on such an issue and on hearing has ordered the Court of Appeals to permit an interpretation of the state statute to be sought in the state court.

In *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 1 L. Ed. 2d 267, 77 S. Ct. 287, this Court stated (at 1 L. Ed. 275):

“The Supreme Court of Louisiana has never considered the specific issue or even discussed generally the rationale of the statute, * * * Before attempting to answer them and to decide their relation to the issues in the case, we think it advisable to have an interpretation, if possible, of the state statute by the only court that can interpret the statute with finality, the Louisiana Supreme Court.

* * *

We therefore modify the judgment of the Court of Appeals to permit an interpretation of the state statute to be sought with every expedition in the state court in conformity with this opinion.”

In an earlier case *Spector Motor Service v. McLaughlin*, 323 U. S. 101, 89 L. Ed. 101, this Court stated (at 89 L. Ed. 104):

"Avoidance of such guesswork, by holding the litigation in the federal courts until definite determinations on local law are made by the state courts, merely heeds this time-honored canon of constitutional adjudication.

• • •

We therefore vacate the judgment of the Circuit Court of Appeals and remand the cause to the District Court with directions to retain the bill pending the determination of proceedings to be brought with reasonable promptitude in the State court in conformity with this opinion."

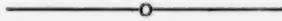
This is an important issue, not just to the parties here, but to all automobile dealers. Is GM entitled to withhold performance of its solemn contractual promises while it unsuccessfully attempts to terminate them? Is GM responsible for the damages it causes while it takes time to decide whether it will attempt to terminate its solemn promises, and while it unsuccessfully proceeds to do so? No Nebraska Court (or any other of which we are aware) has held that contractual promises do not continue. As the Court of Appeals said here (at 705 F. 2d 328) (Appendix A):

"We recognize that the issue is a close one, and that a construction contrary to that of the Federal District Court might have been reached by state court."

As this Court stated in *Leiter Minerals, Inc. v. United States* (at 1 L. Ed., p. 273):

"It is always difficult to feel confident about construing an ambiguous statute when the aids to construction are so meager • • •"

As busy as the Federal Courts, and the Courts of Appeals appear to be, it would appear that this Court should take advantage of the opportunity to have the state courts decide the state law issues.



CONCLUSION

For the foregoing reasons the Petitioners pray that the Court shall issue the Writ of Certiorari.

Respectfully submitted,

KIZZIER CHEVROLET COMPANY, INC.,
OF SCOTTSBLUFF, NEBRASKA, AND
DWAYNE KIZZIER, Petitioners,

By: ROBERT G. SIMMONS, JR. of
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Their Attorney

App. 1

APPENDIX A

KIZZIER CHEVROLET COMPANY, INC., OF
SCOTTSBLUFF, NEBRASKA, and Dwayne Kizzier,
Appellants,

v.

GENERAL MOTORS CORPORATION, OLDSMOBILE
DIVISION, Appellee.

No. 82-1484.

United States Court of Appeals,
Eighth Circuit.

Submitted Feb. 14, 1983.

Decided April 22, 1983.

Rehearing Denied May 4, 1983.

Robert G. Simmons, Jr. of Wright, Simmons & Selzer,
Scottsbluff, Neb., for appellants.

David A. Svoboda, Lyman L. Larsen, Kennedy, Hol-
land, DeLacy & Svoboda, Omaha, Neb., for appellee; Otis
M. Smith, Gen. Counsel, and Timothy C. McCana, General
Motors Corp., Detroit, Mich., of counsel.

Before LAY, Chief Judge, and BRIGHT and ROSS,
Circuit Judges.

BRIGHT, Circuit Judge.

Kizzier Chevrolet Company, Inc., brought this action
against General Motors Corporation (GM), alleging vio-
lation of the Automobile Dealers Day in Court Act, 15
U. S. C. §§ 1221-1225, and breach of a dealer sales and

service agreement. The district court¹ entered judgment for GM, and Kizzier appeals. For the reasons outlined below, we affirm the judgment of the district court.

I. *Background.*

On November 4, 1975, S & T Motors of Scottsbluff, Nebraska, entered into a franchise agreement with GM for the Oldsmobile motor vehicle line manufactured by GM. An explosion and fire destroyed the business premises of S & T Motors on May 4, 1977, to the extent that it was no longer possible for S & T Motors to operate as a dealership. On May 11, 1977, S & T Motors contracted with Dwayne Kizzier, the owner and general manager of Kizzier Chevrolet Company, Inc., for the sale of the assets of S & T Motors, excluding the real estate. The agreement was expressly conditioned upon Kizzier's receiving approval of the transfer from both the Oldsmobile Division of GM and the Nissan Motor Corp., the manufacturer of Datsuns, which were also sold by S & T Motors.

For the purposes of receiving this approval, Robert R. Slie, the managing partner of S & T Motors, and Dwayne Kizzier went to Denver, Colorado, on May 11, 1977, to see Charles J. Bretz, the Denver zone manager for the Oldsmobile Division, and L. W. Melton, Jr., the Denver zone manager for the Chevrolet Division. Neither zone manager was receptive to the idea of Kizzier's obtaining the Scottsbluff Oldsmobile dealership, and no application forms were given to or requested by Kizzier for the purpose of applying for the dealership. Kizzier

¹The Honorable Warren K. Urbom, Chief Judge, United State District Court for the District of Nebraska.

and Slie returned to Scottsbluff that same day. Nevertheless, they announced the sale of S & T Motors to Kizzier the following Friday, and, on Monday, May 16, Kizzier began operating as the Oldsmobile dealership.

In early August 1977, GM orally informed Kizzier Chevrolet and S & T Motors that it would not approve the May 11, 1977, transfer of the Oldsmobile dealership. Thereafter, Kizzier pleaded with GM orally and in writing his reasons for wanting approval of the transfer. GM responded, explaining its preference to award the Oldsmobile dealership to Dalton Buick, the Buick dealer in Scottsbluff, because Dalton Buick was in need of an increased gross profit opportunity in order to continue to operate successfully, and that, in contrast, studies of the Chevrolet Division indicated there was a sufficient profit opportunity in the community to support a single-line Chevrolet dealership.

On August 22, 1977, GM filed an application with the Nebraska Motor Vehicle Industry Licensing Board (licensing board) for permission to terminate its dealer agreement with S & T Motors. Prior to any action by the licensing board on GM's application, S & T Motors relinquished its motor vehicle dealers' license to the board. The licensing board held an evidentiary hearing participated in by Kizzier on October 18, 1977. On December 21, 1977, the licensing board granted GM's application, finding that the sale of assets of S & T Motors did not constitute a transfer of the Oldsmobile dealership and did not obligate GM to award an Oldsmobile franchise to Kizzier; that it would be substantially detrimental to the distribution of GM vehicle products in the community if the board were to order the Oldsmobile Division to enter

into a franchise with Kizzier; and that Dalton Buick of Scottsbluff, Nebraska, was qualified to sell and service Oldsmobile motor vehicles. The findings and order of the board authorized GM to proceed to select a replacement for S & T Motors' dealership. On January 6, 1978, GM sent a letter to Slie with copies going to Kizzier and the licensing board, terminating its dealer agreement with S & T Motors.

S & T Motors, as franchisee, and Kizzier Chevrolet, as an interested party, appealed the order of the licensing board to the district court of Lancaster County. The district court affirmed the order of the board on February 28, 1978. S & T Motors and Kizzier appealed that decision to the Supreme Court of Nebraska without filing a supersedeas bond.

On March 6, 1978, after the district court affirmed the board's decision, but before the expiration of the time for filing a motion for a new trial or a supersedeas bond, GM granted the Oldsmobile franchise to Dalton Buick. On April 24, 1979, more than a year later, the Supreme Court of Nebraska reversed the judgments of the district court and the board, holding that notwithstanding the terms of the franchise agreement, sections 60-1430 and 60-1429 (2) R. R. S. Neb. (Reissue 1978) required GM to give effect to the transfer of the Oldsmobile franchise to Kizzier Chevrolet, unless GM had satisfied its burden of proving in the hearing before the board that the change in ownership from S & T Motors to Kizzier would be "substantially detrimental" to the distribution of the Oldsmobile line in the Scottsbluff community. The Nebraska Supreme Court held that GM failed to satisfy this

burden of proof. *S & T Motors v. General Motors Corp.*, 203 Neb. 188, 277 N.W. 2d 701 (1979).

After the Nebraska Supreme Court's reversal, the district court reversed its judgment and remanded to the licensing board. On August 6, 1979, the board reversed its original decision and denied GM's application for termination. In accordance with the licensing board's reversal, GM, on September 20, 1979, entered into a dealer sales and service agreement with Kizzier Chevrolet for an Oldsmobile franchise.

On November 26, 1979, Kizzier Chevrolet filed an application with the licensing board, requesting the board to order GM to stop selling Oldsmobile motor vehicles to Dalton Buick and order Dalton Buick to stop operating as an Oldsmobile dealership until GM complied with the provisions of sections 60-1422 and 60-1424, relating to the establishment of an additional franchise in a community. On April 13, 1980, after an evidentiary hearing, the board denied the application, finding sections 60-1422 and 60-1424 inapplicable, because on March 6, 1978, the date on which GM executed the Dalton Buick-Oldsmobile franchise, no other dealer in the Scottsbluff community was selling Oldsmobile motor vehicles and products. Kizzier Chevrolet appealed this denial to the district court of Lancaster County. The record in this case does not disclose the disposition of that appeal.

On April 11, 1980, Kizzier Chevrolet filed suit against GM and Dalton Buick in the district court of Scottsbluff County, alleging that the failure of GM and Dalton to comply with the provisions of sections 60-1422 and 60-1424 before entering into a franchise agreement for an Olds-

mobile dealership deprived Kizzier Chevrolet of the benefit of its purchase and of its property without due process of law. Kizzier requested an order enjoining GM from delivering to Dalton Buick and Dalton Buick from selling Oldsmobile motor vehicles or products until there had been compliance with these provisions of the licensing act. Prior to any decision by the district court, GM renewed both the Dalton Buick and the Kizzier Chevrolet agreements, effective November 1, 1980.

On January 20, 1981, the district court of Scottsbluff County granted Kizzier's request for injunctive relief. GM appealed that decision to the Supreme Court of Nebraska and filed a supersedeas bond. The Supreme Court of Nebraska reversed the decree and dismissed the action as a collateral attack on the April 13, 1980, adverse decision of the licensing board. *State of Nebraska ex rel. Kizzier Chevrolet Co., Inc. v. General Motors Corp.*, 211 Neb. 626, 319 N. W. 2d 735 (1982).

Prior to the decision of the state district court, Kizzier commenced this lawsuit against GM, alleging that GM violated the Automobile Dealers Day in Court Act, 15 U. S. C. §§ 1221-1225, by failing to act in good faith in performing or complying with the terms of the November 1, 1975, dealer agreement entered into between S & T Motors and GM and subsequently purchased by Kizzier and in terminating the agreement. The complaint also set forth breach of contract claims, alleging that GM, from May 11, 1977, to September 20, 1979, refused to perform any of its obligations under the November 1, 1975, franchise agreement, and after September 20, 1979, continued to breach the agreement by maintaining the Dalton Buick-

Oldsmobile franchise without first complying with the Licensing Act. Kizzier requested \$755,551 in damages. The district court rejected these contentions and found for GM. Thereafter, the district court denied Kizzier's motion for a new trial. Kizzier timely filed this appeal.

II. Discussion.

On appeal, Kizzier argues that it is entitled to damages for GM's failure to comply with the franchise agreement.² Kizzier contends that GM made a contractual commitment to comply with Nebraska law with respect to any requirements of that law which contravened the responsibilities and obligations of the parties as set forth in the dealer agreement and that GM breached this commitment. Specifically, Kizzier alleges four separate breaches by GM. First, Kizzier alleges a breach from May 11, 1977 to September 20, 1979. These are the dates from when Kizzier purchased the asset of S & T Motors to when GM entered into a dealer sales and service agreement with Kizzier Chevrolet for an Oldsmobile franchise. Second, Kizzier alleges a breach from May 11, 1977 to December 21, 1977. These are the dates from when Kizzier purchased the assets of S & T Motors to when the licensing board granted GM's application to terminate its dealer agreement with S & T Motors. Third, Kizzier alleges a breach from April 24, 1979 to September 20, 1979, the period after the Nebraska Supreme Court reversed the grant of GM's application to terminate its dealer agreement with S & T

²Kizzier has not raised any issue in its brief regarding the Automobile Dealers Day in Court Act. Accordingly, this issue is not before us, and we deem it abandoned. See *Mississippi River Corp. v. F. T. C.*, 454 F. 2d 1083, 1093 (8th Cir. 1972).

Motors but before GM entered into a franchise agreement with Kizzier. Finally, Kizzier asserts that GM breached the contract after September 20, 1979, by continuing to recognize Dalton Buick as an Oldsmobile dealer even though GM had entered into a franchise agreement with Kizzier.

The federal district court determined that the franchise agreement contractually committed GM to comply with Nebraska law with respect to any requirements of Nebraska law which contravene the responsibilities and obligations of the parties as set forth in the dealer agreement. We agree with the district court's conclusion in this regard. Article VII, section H of the franchise agreement provides that:

This Agreement shall be deemed to have been made in and shall be construed in accordance with the laws of the State of Michigan.

If, however, performance by either General Motors or Dealer of any responsibility or obligation under any provision of this Agreement contravenes a law of any state or jurisdiction where such performance is to take place, the performance of such responsibility or obligation shall be in accordance with the requirements of such law only to the extent that the provision requiring such performance contravenes such law and only to the extent and while such law is deemed or held to be valid and is applicable to such performance.

Because GM made this contractual commitment, Kizzier is entitled to base a breach of contract claim for damages on those provisions of the Licensing Act which contravene the terms of the dealer agreement and with which GM allegedly failed to comply. Whether GM has breached its contract will therefore depend, at times, on the require-

ments imposed by Nebraska law, and how Nebraska law is interpreted. We note that although we are not bound by a trial judge's interpretation of state law, we nonetheless give it special weight in diversity cases. *Ancom, Inc. v. E.R. Squibb & Sons, Inc.*, 658 F. 2d 650, 654 (8th Cir. 1981); *Melia v. Ford Motor Company*, 534 F. 2d 795, 799 (8th Cir. 1976). We have stated that "[a]lthough we are not inextricably bound by the trial court's ruling, we nonetheless give deference to his findings on state laws where there is not strong argument that such choice of law is fundamentally deficient in analysis or otherwise lacking in reasoned authority." *Ancom, Inc. v. E.R. Squibb & Sons, Inc.*, *supra*, 658 F. 2d at 654.

A. May 11, 1977 to September 20, 1979.

Under the agreement, the franchise was not transferable. However, the Nebraska Motor Vehicle Licensing Act, §§ 60-1420, 60-1429(2), and 60-1430, R. R. S. Neb. (Re-issue 1978), required GM to recognize the transfer of the Oldsmobile franchise from S & T Motors to Kizzier Chevrolet unless GM established at a hearing before the licensing board good cause for failing to do so.³ In accord with the statutory provisions incorporated into the contract

³. Section 60-1420 of the Licensing Act, provides:

60-1420. Franchise; termination; hearing. Notwithstanding the terms, provisions or conditions of any agreement or franchise, no franchisor shall terminate or refuse to continue any franchise unless the franchisor has first established, in a hearing held under the provisions of this act, that:

(1) The franchisor has good cause for termination or noncontinuance; and

(Continued on next page)

through Article VII, section H of the agreement, GM filed an application with the licensing board to terminate S & T

(Continued from previous page)

(2) Upon termination or noncontinuance, another franchise in the same line-make will become effective in the same community, without diminution of the franchisee's service formerly provided, or that the community cannot be reasonably expected to support such a dealership, except that a franchisor may terminate a franchise for a particular line-make if the franchisor discontinues that line-make and a franchisor may terminate a franchise if the franchisee's license as a motor vehicle, combination motor vehicle and trailer, motorcycle, or trailer dealer is revoked pursuant to the provisions of this act. [Neb. Rev. Stat. § 60-1420 (Reissue of 1978).] Section 60-1429 provides in relevant part:

60-1429. Franchise; termination, discontinuance; not valid provisions. Notwithstanding the terms, provisions or conditions of any agreement or franchise, the following shall not constitute good cause for the termination or non-continuation of a franchise, or for entering into a franchise for the establishment of an additional dealership in a community for the same line-make:

* * * * *

(2) The change of ownership of the franchisee's dealership or the change of executive management of the franchisee's dealership, unless the franchisor, having the burden of proof, proves that such change of ownership or executive management will be substantially detrimental to the distribution of franchisor's motor vehicle, combination motor vehicle and trailer, and motorcycle, or trailer products in the community[.]

[Neb. Rev. Stat. § 60-1429(2) (Reissue of 1978).]

Section 60-1430 provides:

60-1430. Franchise; provisions or conditions changing. Notwithstanding the terms, provisions or conditions or any agreement or franchise, subject to the provisions

(Continued on next page)

Motors' dealership. The licensing board granted GM's application, finding that GM had demonstrated good cause for the termination of S & T Motors' Oldsmobile dealership. In reliance upon this order, GM terminated the S & T motors' franchise, and after the state district court affirmed the decision of the licensing board, GM issued the Oldsmobile franchise to Dalton Buick. Almost two months after the state district court's affirmance, Kizzier appealed to the Supreme Court of Nebraska, without posting a supersedeas bond. On April 24, 1979, the Supreme Court reversed the holdings of the board and the state district court, finding that the transfer of S & T Motors' assets to Kizzier Chevrolet constituted a sale of the dealership and that GM had failed to establish the "substantial detriment" requirement of section 60-1429(2).

Kizzier Chevrolet contends that because the Supreme Court of Nebraska found that GM had failed to satisfy the requirements of Nebraska law, GM breached the contract from May 11, 1977, to September 20, 1979, the time period in which GM refused to recognize Kizzier Chevrolet as an Oldsmobile dealership. GM asserts that its failure to recognize Kizzier as the Oldsmobile dealer and its issu-

(Continued from previous page)

of subdivision (2) of section 60-1429, in the event of the sale or transfer of ownership of the franchisee's dealership by sale or transfer of the business or by stock transfer or in the event of change in the executive management of the franchisee's dealership the franchisor shall give effect to such a change in the franchise unless the transfer of the franchisee's license under this act is denied or the new owner is unable to obtain a license under this act as the case may be. [Neb. Rev. Stat. § 60-1430 (Reissue of 1978).]

ance of the Oldsmobile dealership to Dalton Buick were justified by the findings and orders of the licensing board and the district court and cannot, therefore, be considered a breach of contract.

The federal district court in this case rejected Kizzier's argument and found for GM on this issue. While we do not adopt the district court's reasoning in full on this issue, we agree with the district court's determination that GM did not breach the franchise agreement during this period.⁴

Kizzier's basic position on appeal is that it is entitled to damages because GM failed to recognize Kizzier as the Oldsmobile dealer after Kizzier purchased the assets of S & T Motors. However, we observe that GM was contractually obligated only to comply with statutory obligations imposed by the Nebraska law. Therefore, absent a

⁴The federal district court determined that GM was justified in relying upon the decisions of the board and the state district court in refusing to recognize the transfer of the S & T Motors Oldsmobile franchise to Kizzier Chevrolet. The district court applied the equitable principle that an act lawful when done does not become unlawful by reason of subsequent events. The district court concluded that GM's action, which was lawful at the time it was taken, did not by reason of the Supreme Court reversal become a breach of the dealer agreement. The district court also observed that Kizzier did not file a supersedeas bond. The court held that because Kizzier failed to execute or even request permission of the state district court to execute a supersedeas bond, it cannot now expect to receive damages for actions taken pursuant to judgments which remained in full force and effect until their reversal. Because we base our decision on this issue on the district court's ruling that a franchisor, under Nebraska law, is not required to recognize immediately a change in ownership of a franchise, we need not reach the district court's application of equitable principles as a bar to Kizzier's claim for damages.

failure to comply with state law on this issue, there can be no breach of contract. The federal district court ruled, as a matter of state law, that a franchisor is not required under sections 60-1430 and 60-1429(2) of the Licensing Act to give effect to a change in ownership of a franchise until the franchisor has had the opportunity to prove the change in ownership would be substantially detrimental to the distribution of the franchisor's motor vehicles. After careful review, we conclude that it is unclear from the language of the applicable statutes whether Nebraska law requires a franchisor to give effect to a contract for a change in ownership immediately or whether the franchisor may await the action of the licensing board upon the franchisor's application to terminate that franchise. For example, section 60-1430 provides in part that

in the event of the sale or transfer of ownership of the franchisee's dealership by sale or transfer of the business * * * the franchisor shall give effect to such a change in the franchise *unless* the transfer of the franchisee's license * * * is denied * * *. [Emphasis added.]

This section could be read as requiring that the franchisor recognize a contract for change in ownership until the licensing board has had a chance to act on this issue, or as requiring only that the franchisor recognize the contract after the board has acted. In light of these two possible constructions, we defer to the district court's interpretation on this issue. In doing so, we recognize that the issue is a close one, and that a construction contrary to that of the federal district court might have been reached by a state court. We also note that Nebraska courts have not decided this precise issue, and recently, the Nebraska Supreme Court, when confronted with a related issue which

might have provided some guidance in this area, decided not to reach the issue, and instead dismissed the action as a collateral attack. *State of Nebraska ex rel. Kizzier Chevrolet Co., Inc. v. General Motors Corp.*, *supra*, 319 N.W. 2d at 736-37.⁵

In sum, we defer to the district court on this issue of state law. Thus, there can be no breach of the dealer agreement by GM for failing to recognize Kizzier as the Oldsmobile dealer when GM was not obligated under state law to do so. Absent a breach of contract, Kizzier is not entitled to damages.

B. May 11, 1977 to December 21, 1977.

Kizzier also contends that GM breached the franchise agreement from May 11, 1977 to December 21, 1977. This is the period from when Kizzier purchased the assets of S & T Motors to when the licensing board granted GM's application for permission to terminate its dealer agreement with S & T Motors. Kizzier argues that sections 60-1430 and 60-1429(2) required GM to recognize the change in franchise ownership until GM proved the change of ownership would be substantially detrimental to the distribution of GM's motor vehicles. As noted earlier, the district court rejected this construction and concluded that

⁵Specifically, the issue raised was whether the Nebraska Supreme Court's reversal in *S & T Motors v. General Motors Corp.*, *supra*, would have the effect of reinstating the franchise of S & T Motors during the period between the state district court's decree and the Supreme Court opinion, mandating that GM apply to the licensing board and receive permission before granting a franchise to Dalton. *State of Nebraska ex rel. Kizzier Chevrolet Co., Inc. v. General Motors Corp.*, *supra*, 319 N.W. 2d at 736.

sections 60-1430 and 60-1429(2) do not require a franchisor to give effect to a contract for a change of ownership until the franchisor has had the opportunity to make the necessary showing. Thus, the court concluded that GM did not breach the contract by failing to recognize Kizzier as a dealer until the licensing board ruled on GM's application for permission to terminate its dealer agreement with S&T Motors. Because we defer to the district court's interpretation of state law on this issue, we reject Kizzier's argument.

C. April 24, 1979 to September 20, 1979.

Additionally, Kizzier contends that GM breached the franchise agreement from April 24, 1979, to September 20, 1979, the period after the Supreme Court reversed the board and the state district court but before GM entered into a franchise agreement with Kizzier. The district court rejected Kizzier's position on this issue. The court noted that on August 6, 1979, the board reversed its earlier findings and order and denied GM's application. The district court observed that five weeks later, on September 13, 1977. GM notified Kizzier by letter that it would execute a dealer agreement with Kizzier for Oldsmobile motor vehicles. The district court found this delay not unreasonable. The record supports this finding.

D. After September 20, 1979.

Finally, Kizzier argues that GM breached the contract after September 20, 1979, the date it entered into a franchise agreement with Kizzier, by continuing to recognize Dalton Buick as an Oldsmobile dealership without complying with the applicable provisions of the Licensing Act.

Under the terms of the November 1, 1975, dealer agreement, Paragraph First, the dealership Oldsmobile granted S & T Motors was "nonexclusive." However, under section 60-1422 of the Licensing Act, a franchise is exclusive to the extent that a franchisor cannot enter into a franchise for the same line-make already represented in the community without first establishing in a hearing before the licensing board good cause for the additional dealership. Article VII, section H of the dealer agreement requires GM to comply with this statutory provision if applicable. The question presented to the federal district court was whether GM was required, under the circumstances of this case, to comply with the provisions of section 60-1422. The district court concluded that it was not. The district court noted that the licensing board specifically found, in its order of April 13, 1980, the provisions of section 60-1422 inapplicable to this case, because of the absence of an ongoing Oldsmobile franchise in the Scottsbluff community at the time GM entered the franchise agreement with Dalton Buick. The district court concluded that the plaintiff could not collaterally attack this decision. The district court also indicated that, assuming that Kizzier could collaterally attack the board's decision, it would adopt the licensing board's decision that section 60-1422 was inapplicable. The district court noted that, at the time GM issued the Oldsmobile franchise to Dalton Buick, S & T Motors had relinquished its motor vehicle dealer's license, and the licensing board, with the approval of the district court, had held that the Oldsmobile dealership had not been effectively transferred to Kizzier. The district court reasoned that because there was no Oldsmobile franchise represented in the Scottsbluff community, it was not necessary for GM to comply with the provisions of the Licensing Act

relating to the establishment of an additional franchise. The district court concluded that GM did not breach the franchise agreement by failing to comply with section 60-1422.

We agree with the district court's rejection of Kizzier's contentions on this issue. We note only that the state licensing board, applying state law, held that GM was not required to comply with the provisions of section 60-1422. Where state law supplies the rule of decision, it is the duty of federal courts to ascertain and apply that law. *Stoner v. New York Life Ins. Co.*, 311 U. S. 464, 61 S. Ct. 336, 85 L. Ed. 284 (1940). Therefore, GM's grant to Kizzier of a non-exclusive franchise did not, under the circumstances of this case, amount to a breach of contract.

III. Conclusion.

In sum, we hold that GM has fully complied with the provisions of Nebraska law relating to the state regulation of automobile franchises. We therefore conclude that no breach of contract occurred, and accordingly affirm the judgment of the district court.

App. 18

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV80-O-466

KIZZIER CHEVROLET COMPANY, INC.,
OF SCOTTSBLUFF, NEBRASKA,
and DWAYNE KIZZIER,

Plaintiffs,

vs.

GENERAL MOTORS CORPORATION,
OLDSMOBILE DIVISION,

Defendant.

MEMORANDUM OF DECISION

(Filed December 30, 1981)

APPEARANCES:

For plaintiffs, Robert G. Simmons, Jr.

For defendant, David A. Svoboda and Timothy McCann
URBOM, Chief Judge

This is an action for damages brought by Kizzier Chevrolet Company, Inc. against General Motors Corporation, alleging violation of the Automobile Dealers Day in Court Act, 15 U.S.C. §§ 1221-1225, and breach of a dealer sales and service agreement. Jurisdiction of the court is conferred by 15 U.S.C. § 1222 and 28 U.S.C. § 1332. Trial was held on November 26, 27 and 28, 1981, at North Platte, Nebraska.

A summary of facts as found by the court follows; the facts will be discussed in greater detail in the text of this memorandum opinion.

On November 4, 1975, S & T Motors entered into a franchise agreement with General Motors for the Oldsmobile motor vehicle line manufactured by GM. An explosion and fire destroyed the business premises of S & T Motors on May 4, 1977, to the extent that it was no longer possible for S & T Motors to operate as a dealership. On May 11, 1977, S & T Motors entered into a contract with the plaintiff for the sale of the assets of S & T Motors, excluding the real estate. The agreement was expressly conditioned upon Kizzier's receiving approval of the transfer from both the Oldsmobile Division of GM and the Nissan Motor Corp., the manufacturer of Datsuns which were also sold by S & T Motors.

For purposes of receiving this approval, Robert R. Slie, the managing partner of S & T Motors, and Dwayne Kizzier, the owner and general manager of Kizzier Chevrolet Company, Inc., went to Denver, Colorado, on May 11, 1977, to see Charles J. Bretz, the Denver zone manager for the Oldsmobile Division, and L. W. Melton, Jr., the Denver zone manager for the Chevrolet Division. Neither zone manager was receptive to the idea of Kizzier's obtaining the Scottsbluff Oldsmobile dealership, and no application forms were given to or requested by Mr. Kizzier for the purpose of applying for the dealership. Mr. Kizzier and Mr. Slie returned to Scottsbluff that same day, the sale of S & T Motors to Kizzier was announced the following Friday, and on Monday, May 16, 1977 Kizzier began operating as the Oldsmobile dealership.

In early August, 1977, General Motors orally informed Kizzier Chevrolet and S & T Motors that it would not approve the May 11, 1977, transfer of the Oldsmobile dealership. Thereafter Mr. Kizzier pleaded with General Mo-

tors orally and in writing his reasons for wanting approval of the transfer. General Motors responded, explaining its preference to award the Oldsmobile dealership to Dalton Buick, the Buick dealer in Scottsbluff, because Dalton Buick was in need of an increased gross profit opportunity in order to continue to operate successfully, and that, in contrast, studies of the Chevrolet Division indicated there was a sufficient profit opportunity in the community to support a single-line Chevrolet dealership.

On August 22, 1977, General Motors filed an application with the Nebraska Motor Vehicle Industry Licensing Board for permission to terminate its dealer agreement with S & T Motors, on the grounds that S & T Motors had breached its dealer agreement by failing to maintain dealership operations for more than seven consecutive business days, by failing to have an established place of business, by conducting partial dealership operations at the Kizzier Chevrolet facilities, by entering into a buy-sell agreement with Kizzier without prior written approval of the Oldsmobile Division, and by entering into a contract for the sale of the principal assets required to conduct dealership operations. Prior to any action by the licensing board on General Motor's application, S & T Motors relinquished its motor vehicle dealer's license to the board. An evidentiary hearing, participated in by Kizzier, was held on October 18, 1977, and on December 21, 1977, the licensing board granted General Motors' application, finding that the sale of the assets of S & T Motors did not constitute a transfer of the Oldsmobile dealership and did not obligate GM to award an Oldsmobile franchise to Kizzier; that it would be substantially detrimental to the distribution of General Motors' vehicle products in the community if the board

were to order the Oldsmobile Division to enter into a franchise with Kizzier; and that Dalton Buick of Scottsbluff, Nebraska, was qualified to sell and service Oldsmobile motor vehicles. The findings and order of the board authorized General Motors to proceed to select a replacement for the S & T Motors dealership. On Friday, January 6, 1978, General Motors sent a letter to Mr. Slie, with copies going to Mr. Kizzier and the licensing board, terminating its dealer agreement with S & T Motors effective the date of the letter.

Pursuant to the provisions of § 60-1415, R. R. S. Neb. (Reissue 1978), S & T Motors, as franchisee, and Kizzier Chevrolet, as an interested party, appealed the order of the licensing board to the District Court of Lancaster County; the district court affirmed the order of the board on February 28, 1978. S & T Motors and Kizzier appealed that decision to the Supreme Court of Nebraska, without filing a supersedeas bond.

On March 6, 1978—after the district court's affirmance of the board's decision but before the expiration of the time for filing a motion for new trial or a supersedeas bond—General Motors granted the Oldsmobile franchise to Dalton Buick. On April 24, 1979—more than a year later—the Supreme Court of Nebraska reversed the judgments of the district court and the board, holding that under §§60-1430 and 60-1429(2), R. R. S. Neb. (Reissue 1978), notwithstanding the terms of the franchise agreement, General Motors was required to give effect to the transfer of the Oldsmobile franchise to Kizzier Chevrolet, unless it had satisfied its burden of proving in the hearing before the board that the change in ownership from S & T Motors to Kizzier would be "substantially detrimental" to the distri-

bution of the Oldsmobile line in the Scottsbluff community; the court held that General Motors had failed to satisfy this burden of proof. *S & T Motors v. General Motors Corp.*, 203 Neb. 188, 277 N.W. 2d 701 (1979).

After the reversal, the district court reversed its judgment and remanded to the licensing board, and on August 6, 1979, the board reversed its decision granting General Motors' application for termination. In accordance with the reversal, General Motors on September 20, 1979, entered into a dealer sales and service agreement with Kizzier Chevrolet for an Oldsmobile franchise.

On November 26, 1979, Kizzier Chevrolet filed an application with the licensing board, requesting the board to order General Motors to stop selling Oldsmobile motor vehicles to Dalton Buick and order Dalton Buick to stop operating as an Oldsmobile dealership until General Motors complied with the provisions of §§ 60-1422 and 1424, relating to the establishment of an additional franchise in a community. On April 13, 1980, after an evidentiary hearing, the board denied the application, finding that the provisions of §§ 60-1422 and 60-1424 were inapplicable, because on March 6, 1978—the date on which the Dalton Buick Oldsmobile franchise agreement was executed—there was no other dealer in the Scottsbluff community selling Oldsmobile motor vehicles and products. Kizzier Chevrolet appealed this denial to the District Court of Lancaster County, and the appeal is still pending.

On April 11, 1980, Kizzier Chevrolet filed suit against General Motors and Dalton Buick in the District Court of Scotts Bluff County, Nebraska, alleging that the failure of General Motors and Dalton to comply with the provisions of §§ 60-1422 and 60-1424 before entering into a franchise

agreement for an Oldsmobile dealership deprived Kizzier Chevrolet of the benefit of its purchase and of its property without due process of law. Kizzier requested an order enjoining General Motors from delivering to Dalton Buick and Dalton Buick from selling Oldsmobile motor vehicles or products until there had been compliance with the cited provisions of the Licensing Act. Prior to a decision by the district court, General Motors renewed both the Dalton Buick and the Kizzier Chevrolet dealer agreements, effective November 1, 1980.

On January 20, 1981, the District Court of Scotts Bluff County granted Kizzier's request for injunctive relief on the grounds that Kizzier's had a property interest which included the expectation that no additional Oldsmobile franchise would be established in the Scottsbluff community, unless the provisions of the Licensing Act were first complied with, that this interest had not and would not be protected, and that Kizzier would suffer irreparable injury if General Motors and Dalton were not restrained from continuing an Oldsmobile dealership until it had been established before the licensing board that good cause existed and that the public interest would be served by having two dealers. The state district court concluded that Kizzier had no adequate remedy at law, because the licensing board had no equitable powers but could only determine matters of law. General Motors appealed that decision to the Supreme Court of Nebraska and filed a supersedeas bond; the appeal is still pending.

Prior to the decision of the state district court, Kizzier commenced this lawsuit against General Motors, alleging two claims under the Automobile Dealers Day in Court Act, 15 U. S. C. §§ 1221-1225—that General Motors failed

to act in good faith in performing or complying with the terms of the November 1, 1975, dealer agreement entered into between S & T Motors and General Motors and subsequently purchased by Kizzier, and in terminating the agreement. The complaint also sets forth a breach of contract claim, alleging that General Motors from May 11, 1977, to September 20, 1979, refused to perform any of its obligations under the November 1, 1975, franchise agreement and after September 20, 1979, continued to breach the agreement by maintaining the Dalton Buick-Oldsmobile franchise without first complying with the Licensing Act. Kizzier Chevrolet requests \$755,551.00 for damages sustained as a result of General Motors' alleged failure to act in good faith and General Motors' alleged breach of the franchise agreement.¹

I.

THE FEDERAL CLAIMS

The Automobile Dealers Day in Court Act authorizes a suit by an automobile dealer against an automobile manufacturer for damages sustained by reason of the failure of the manufacturer:

“ . . . to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer. . . . ”

15 U. S. C. § 1222.

Tit. 15 U. S. C. § 1221(e) defines the term “good faith” to mean:

“ . . . the duty of each party to any franchise . . . to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from co-

ercion, intimidation, or threats of coercion or intimidation from the other party: *Provided*, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith."

Even assuming without deciding that Kizzier Chevrolet has standing to challenge General Motors' alleged violations of the federal act and that Kizzier's federal claims are not barred by the three-year statute of limitations prescribed by the Act in 15 U.S.C. § 1223, I am convinced that Kizzier Chevrolet has failed to sustain its burden of proving lack of good faith on the part of General Motors in failing to deliver Oldsmobile automobiles to Kizzier from May, 1977, to October, 1979, in granting Dalton Buick an Oldsmobile franchise on March 6, 1978, and in attempting to terminate its franchise agreement with S & T Motors.

Failure to exercise "good faith" within the meaning of the Automobile Dealers Act has been given a limited and restrictive meaning by the federal courts, so that in the absence of coercion, intimidation, or threats there can be no recovery under the Act. Coercion or intimidation implies at best a wrongful demand which will result in sanctions for failure to comply. *Francis Chevrolet Co. v. General Motors Corp.*, 602 F. 2d 227, 229 (C. A. 8th Cir. 1979); *Autohaus Brugger, Inc. v. Saab Motors, Inc.*, 567 F. 2d 901, 911 (C. A. 9th Cir. 1978); and *Fray Chevrolet Sales, Inc. v. General Motors Corp.*, 536 F. 2d 683, 685 (C. A. 6th Cir. 1976). There is no evidence in this case that General Motors sought to coerce or intimidate Kizzier Chevrolet to do anything. The evidence reveals that General Motors refused to recommend the transfer of the S & T Motors Oldsmobile dealership to Kizzier Chevrolet,

because, taking into consideration the interest of all the General Motors' divisions represented in the Scottsbluff community, the dualing of the Oldsmobile and Chevrolet dealerships would be substantially detrimental to the Buick dealership, which was suffering a very low return on investment and without increased profit opportunity would not be able to continue to operate. General Motors concluded, therefore, that the dualing of the Buick and Oldsmobile dealerships would be most beneficial for the sale of General Motors products on the whole. This decision was given the approval of both the Nebraska Motor Vehicle Industry Licensing Board and, upon appeal, the District Court of Lancaster County, Nebraska. It was not until April 24, 1979—after General Motors had terminated the S & T Motors franchise and issued the Dalton Buick Oldsmobile franchise—that the Supreme Court of Nebraska reversed the decision of the District Court of Lancaster County, Nebraska, finding that under Nebraska law—§ 60-1429(2)—General Motors was required to demonstrate “substantial detriment” to the line of motor vehicles covered by the franchise and not to “all of the motor vehicles which a franchisor may distribute through various divisions and separate franchises.” Under such an interpretation of the statute, General Motors failed to carry its burden of proof in the hearing before the licensing board that there would be a substantial detriment to the distribution of *Oldsmobile* motor vehicles, if Kizzier Chevrolet were awarded the Oldsmobile franchise. Regardless of whether the licensing board's and the district court's orders protected General Motors from legal liability for actions taken during the appeal interim, an issue discussed *infra*, I find from the evidence in this case that General Motors relied upon these orders in terminating the S & T

Motors franchise and awarding the Oldsmobile franchise to Dalton Buick and that its actions were, therefore, taken in good faith. The only evidence from which it could be inferred that General Motors acted in bad faith is its issuance of the Oldsmobile franchise to Dalton Buick before the expiration of the time for filing a motion for new trial or for posting a supersedeas bond, and this evidence is not sufficient to prove the coercion or intimidation necessary for a finding of liability under the Automobile Dealers Act. The evidence also fails to support a finding that General Motors' continuation of the Dalton Buick Oldsmobile dealership after the decision of the Supreme Court was for the purpose of coercing or intimidating Kizzier. Without such evidence there can be no liability on the part of General Motors under the Automobile Dealers Day in Court Act. *Autohaus Brugger, Inc. v. Saab Motors, Inc.*, supra, at 914 (appointing a new dealer in the same area is not a violation of the Act unless it is used as a method of coercion).

II.

BREACH OF CONTRACT CLAIM

Kizzier Chevrolet claims that General Motors breached the terms of the November 1, 1975, dealer agreement between S & T Motors and GM which Kizzier claims was transferred to it when Kizzier purchased the assets of S & T Motors on May 11, 1977. Specifically, Kizzier claims that General Motors was in breach of the agreement from May 11, 1977, to September 20, 1979—the date GM entered a franchise agreement with Kizzier—by terminating the S & T Motors Oldsmobile franchise, refusing to recognize Kizzier as a viable Oldsmobile dealership, and issuing

an Oldsmobile franchise to Dalton Buick without complying with the provisions of the Nebraska Motor Vehicle Industry Licensing Act. Kizzier further alleges that General Motors was in breach of contract after September 20, 1979, by continuing to recognize Dalton Buick as an Oldsmobile dealership without complying with the applicable provisions of the licensing act. Kizzier contends that General Motors was bound under the terms of the agreement to comply with Nebraska law.

A. Transfer of the Dealership

Under paragraph FIRST of the November 1, 1975, dealer agreement, the franchise and related rights were not transferable, assignable or saleable by the dealer. However, article VII, section H of the agreement made provision for conflicting state law:

"This Agreement shall be deemed to have been made in and shall be construed in accordance with the laws of the State of Michigan.

"If, however, performance by either General Motors or Dealer of any responsibility or obligation under any provision of this Agreement contravenes a law of any state or jurisdiction where such performance is to take place, the performance of such responsibility or obligation shall be in accordance with the requirements of such law only to the extent that the provision requiring such performance contravenes such law and only to the extent and while such law is deemed or held to be valid and is applicable to such performance."

Under the terms of this section General Motors made a contractual commitment to comply with Nebraska law with respect to any requirements of that law which contravened the responsibilities and obligations of the parties as set forth in the dealer agreement.²

As noted, under the agreement the franchise was not transferable. However, under the Nebraska Motor Vehicle Licensing Act, §§ 60-1429 and 60-1430, R. R. S. Neb. (Reissue 1978), General Motors was required to recognize the transfer of the Oldsmobile franchise from S & T Motors to Kizzier Chevrolet, unless it established at a hearing before the licensing board good cause for failure to do so. In accord with these statutory provisions and article VII, section H, of the agreement, General Motors filed an application with the licensing board to terminate the S & T Motors dealership and sought to prove at a hearing before the board that the dualing of the Oldsmobile and Chevrolet lines would be substantially detrimental to the distribution of Buick vehicles, because the Buick dealership in Scottsbluff, Nebraska—Dalton Buick—could not continue to operate successfully unless it increased its profits, an end which could be accomplished by dualing the Oldsmobile and Buick lines. The licensing board granted General Motors' application, finding that GM had demonstrated good cause for the termination of the S & T Motors Oldsmobile dealership. In reliance upon this order, General Motors terminated the S & T Motors franchise, and after the decision of the licensing board was affirmed by the district court, General Motors issued the Oldsmobile franchise to Dalton Buick. Almost two months after the state district court's affirmance, Kizzier appealed to the Supreme Court of Nebraska, without posting a supersedeas bond. On April 24, 1979, the Supreme Court reversed the holdings of the board and the state district court, finding that the transfer of S & T Motors' assets to Kizzier Chevrolet constituted a sale of the dealership and that General Motors had failed to establish the "substantial detriment" requirement of § 60-1429(2).

Kizzier Chevrolet contends that because the Supreme Court of Nebraska found that General Motors had failed to satisfy the requirements of Nebraska law, GM was in breach of the contract from May 11, 1977, to September 20, 1979—the time period in which GM refused to recognize Kizzier Chevrolet as an Oldsmobile dealership. General Motors asserts that its failure to recognize Kizzier as the Oldsmobile dealer and its issuance of the Oldsmobile dealership to Dalton Buick were justified by the findings and orders of the licensing board and district court and cannot, therefore, be considered to be a breach of contract. General Motors contends that, in accord with equitable principles, the Supreme Court's reversal of the orders of the board and state district court restored to Kizzier Chevrolet that which was received by GM as a result of its reliance upon the erroneous orders—the Oldsmobile dealership which had previously been terminated.

It is a general principle of law that a subsisting judgment of a court which had jurisdiction over the parties and subject matter is binding upon all who were parties and constitutes a sufficient justification for all acts done in its enforcement until it is reversed. *Berthold-Jennings Lumber Co. v. St. Louis, I. M. & S. Railway Co.*, 80 F. 2d 32, 39-40 (C. A. 8th Cir. 1935); *Porter v. Small*, 120 P. 393, 397 (Ore. 1912); *Bridges v. McAlister*, 106 Ky. 791, 51 S. W. 603, 604-605 (1899); *Thompson v. Reasoner*, 122 Ind. 454, 24 N. E. 223, 224 (1890); and *Peck v. McLean*, 36 Minn. 228, 30 N. W. 759, 761 (1886). However, upon reversal of the judgment, the unsuccessful appellee must make full restitution of all benefits received by it as a result of the erroneous judgment. *Id.* See, also, *B. & O. R. Co. v. United States*, 279 U. S. 781, 786 (1929).

While I find no Nebraska cases specifically adopting these general principles of law, there are Nebraska cases in which they have been followed. See *Clough v. Buck*, 6 Neb. 343, 348 (1877) (where the court allowed the defendant to assert payment of money pursuant to a garnishment which was based on a judgment later reversed as a defense in an action for payment of the note on which the defendant had been garnished); *Heir v. Anheuser-Busch Brewing Assn.*, 60 Neb. 320, 321, 83 N. W. 77 (1900) (where the court held that the brewing association's execution of a decree later reversed was a lawful act and "no subsequent event could change its nature and make it wrongful"). See, also, *Hall v. Hall*, 176 Neb. 555, 557-558, 126 N. W. 2d 839 (1964), where it is stated that a judgment shall, in the absence of a supersedeas undertaking, retain its vitality and be capable of execution during the pendency of the appeal).³

The principle and its supportive reasoning are aptly stated in *Berthold*, *supra*, at 39-40:

" . . . The reversal of a judgment does not make void what has been done under it. . . . A judgment, even though later reversed, protects one who acts under it. What is lawful when done does not become unlawful by reason of subsequent acts any more than acts which were not criminal when committed can be made criminal by subsequent occurrences. The court in entering a judgment does not act as agent for either party, and a litigant does not procure a judgment in any such sense as to render him responsible for the consequences of the judgment on its reversal by a higher court. A subsisting judgment of a court which had jurisdiction of the parties and the subject-matter constitutes a complete justification for all acts done in its enforcement until it is reversed. . . ." (Cites omitted.)

Kizzier Chevrolet contends that the above-stated general principles are applicable only to protect a party against later being sued in tort rather than in contract, as in this case, and only when the party acted pursuant to a court judgment which ordered, mandated or required that a particular action be taken. I do not find this to be the law.

First, I find no reason for distinguishing between an action based on a breach of contract as opposed to a tort theory. The premises underlying the principle that a subsisting judgment, although later reversed, protects one who acts under it remains the same in either case. As stated in *Bridges v. McAlister*, supra, at 605:

“ . . . The law, from principle and policy, requires that full confidence should be given to their judgments while in force. It tends to prevent the troubles incident to the settlement of disputes by the act of the parties, often bringing about breaches of the peace or bloodshed. It is the duty of every good citizen to obey the mandates of the law, and no one should incur any responsibility by doing that which it was his duty to do. It is also the duty of every citizen to uphold the authority of the courts, and maintain respect for their judgments; and when in doing this, he obeys a judgment of the court, it is a sound and safe rule that no liability for damages should arise therefrom. . . .”

Second, I do not find that it is necessary that the party raising the justification defense have acted pursuant to a court order mandating that it take some affirmative action. In *Porter v. Small*, 120 P. 393 (1912), the relief requested and given in the original action was a declaration of the parties' rights with respect to entitlement to the waters of a creek for irrigation purposes. The order of the court, which was subsequently reversed, did not require any

action on the part of any party. This fact did not deter the Supreme Court of Oregon from entertaining the defendant's justification defense. The supreme court, noting that the decree of the district court was "self-executing," in that it was not necessary for an execution or order of the court to enable the party to reap the fruits of the decree, nonetheless held that the successful party in the lower court had the right to assume that the decree of the court was lawful and proper and that he would not be adjudged to have acted wrongfully in acting upon that assumption.

I find that General Motors was justified in relying upon the legal soundness of the decisions of the board and district court in refusing to recognize the transfer of the S & T Motors Oldsmobile franchise to Kizzier Chevrolet. Under the equitable principle that that which was lawful when done does not become unlawful by reason of subsequent acts, General Motors' actions, which were lawful at the time they were taken, did not by reason of the supreme court reversal become a breach of the dealer agreement.

To hold otherwise would negate the purposes of a supersedeas bond. As stated in *Thompson v. Reasoner*, supra, 24 N. E. at 225:

" . . . There would be no inducement for an appellant in any case to secure a *supersedeas* to stay proceedings, if it were held that the plaintiff assumed the liability of all damages which might result from the enforcement of the judgment; nor would any one venture to enforce a judgment while the right of appeal existed, or while an appeal was pending. . . ."

In the instant case no supersedeas bond was filed by Kizzier Chevrolet. Kizzier contends that such a bond was

not authorized by § 25-1916, R.R.S. Neb. (Reissue 1979), which sets forth the circumstances in which such a bond may be filed. While this case may not fall within those specified in § 25-1916, Nebraska law is clear that a trial court may in its discretion grant supersedeas in cases not specified in the section. See *Hall v. Hall*, 176 Neb. 555, 558-559, 126 N.W. 2d 839 (1964). Because Kizzier failed to execute or even request permission of the district court to execute a supersedeas bond, it cannot now expect to receive damages for actions taken pursuant to judgments which remained in full force and effect until their reversal. As stated by the court in *Porter v. Small*, supra, 120 P. at 398:

"Plaintiffs did not seem to have such confidence in the merits of their appeal as to be willing to take any chance of paying damages in case it should be adjudged groundless, and they should not now be permitted to mulct Small in damages, because he was not wiser than the circuit court, and did not know the law which this court consumed 125 pages of the Oregon reports in explaining."

There remain the questions of whether General Motors was in breach of the November 1, 1975, agreement from May 11, 1975, to December 21, 1977—the period before the board granted GM's application⁴—and whether General Motors was in breach of the agreement from April 24, 1979, to September 20, 1978—the period after the supreme court reversal but before GM entered a franchise agreement with Kizzier.

Under article II, section H, General Motors agreed to comply with the requirements of Nebraska law insofar as those requirements were inconsistent with the responsibilities and obligations set forth in the agreement. Under the Licensing Act, General Motors was required to give

effect to the transfer of ownership of the Oldsmobile dealership *unless* it proved the change of ownership would be substantially detrimental to the distribution of GM's motor vehicles. §§ 60-1430 and 60-1429(2). The question presented is whether General Motors was required under these provisions to recognize the change in franchise ownership *until* such time as it had made the necessary showing.

The provisions of the Nebraska Motor Vehicle Industry Licensing Act are geared toward preserving the status quo until the licensing board has the opportunity to consider and rule on an application. Thus, in §§ 60-1420, 60-1421, and 60-1422, before a franchisor can terminate a franchise, establish a franchise once terminated, or establish an additional franchise, it must first establish in a hearing before the board good cause to do so. A similar order of priority is not specified in §§ 60-1430 or 60-1429 (2). I do not read these sections as requiring that the franchisor recognize a change in franchise ownership *until* it makes the necessary showing, but rather *unless* it makes the necessary showing. With the policy of preserving the status quo in mind, I find that a franchisor is not required to give effect to a contract for a *change* of ownership until it has had the opportunity to make the necessary showing.

This construction of the statutory provisions in question does not mean, however, that a franchisor can unduly delay in making the necessary showing. Neither the Licensing Act nor the November 1, 1975, agreement gives any guidance as to the time in which General Motors should have filed its application with the licensing board. However, under general contract principles, in the ab-

sence of a provision in the contract designating the time within which performance must be completed, the law implies a reasonable time, and what is a reasonable time is to be determined from the general nature and circumstances of the case. *Gustav Thieszen Irrigation Co., Inc. v. Meinberg*, 202 Neb. 666, 669, 276 N.W. 2d 664 (1979); *Davco Realty Co. v. Picnic Foods, Inc.*, 198 Neb. 193, 199, 252 N.W. 2d 142 (1977).

In the instant case S & T Motors and Kizzier Chevrolet entered into a contract for the transfer of ownership in the dealership on May 11, 1977. General Motors filed its application to terminate the S & T Motors franchise on August 22, 1977—just over three months later. During this three-month period the parties were in negotiations in an attempt to settle their differences. On the basis of the evidence before me, I cannot say that General Motors delayed an unreasonable amount of time in filing its application with the licensing board.

Even if it were assumed that General Motors did delay unreasonably in filing its application with the licensing board, it does not appear that Kizzier Chevrolet suffered any damages as a result. As testified by Henry C. Tagler, Jr., the Oldsmobile manager for Kizzier, upon his arrival at Kizzier Chevrolet he placed an order for 25 to 30 new Oldsmobile automobiles, and it was hoped that they would be received by October of 1977, the new-car announcement time. There is no indication that recognition of Kizzier as the Oldsmobile dealer during the period prior to its application with the licensing board would have made any difference in Kizzier's ability to receive new cars for sale during that period.

Kizzier also contends that it is entitled to damages for the period after the supreme court's reversal but before General Motors entered into a franchise agreement with Kizzier—April 24, 1979 to September 20, 1979. While the supreme court's reversal was on April 24, 1979, it was not until August 6, 1979—after the district court reversed and remanded—that the board reversed its earlier findings and order and denied General Motors' application. On September 13, 1977, General Motors notified Kizzier by letter that it was prepared to execute a dealer agreement with Kizzier for Oldsmobile motor vehicles. I do not find this delay to be unreasonable.

B. Additional Oldsmobile Dealership

Under the terms of the November 1, 1975, dealer agreement, paragraph FIRST, the dealership granted by Oldsmobile was "non-exclusive." However, under § 60-1422 of the Licensing Act, a franchise is exclusive to the extent that a franchisor cannot enter into a franchise for the same line-make already represented in the community without first establishing in a hearing before the licensing board good cause for the additional dealership. Article VII, section H, of the dealer agreement requires General Motors to comply with this statutory provision to the extent that performance required by the contract contravenes and "to the extent and while such law is deemed or held to be valid and is applicable to such performance."

The question presented in this case is whether General Motors was required to comply with the provisions of § 60-1422. I find that it was not.

The licensing board has already considered this very issue and decided it in favor of General Motors. Kizzier, having been a party to those proceedings, is now collaterally estopped from relitigating the issue. Kizzier claims that the board had no jurisdiction to give the relief requested in Kizzier's application and that the board's decision is therefore void and without preclusive effect. See *Transport Workers of America v. Transit Authority of City of Omaha*, 205 Neb. 26, 30, 286 N. W. 2d 102 (1979). I find, however, that the licensing board did have statutorily authorized jurisdiction over Kizzier's application.

The powers of the board as set forth in § 60-1403, R. R. S. Neb. (Reissue 1979), are broad:

"The board shall have full power to regulate the issuance and revocation of licenses in accordance with and subject to the provisions of this act, to perform all acts and duties provided for herein necessary to the administration and enforcement of this act, and to make and enforce rules and regulations relating to the administration of but not inconsistent with the provisions of this act. . . ."

Under § 60-1403.01, no person shall act as a motor vehicle dealer without being licensed by the board; under § 60-1411.02 (11), the board is authorized upon its own motion or upon a written sworn complaint to investigate the actions of a licensed motor vehicle dealer and to revoke or suspend any license for failure to comply with provisions of the Act. While § 60-1415.01 authorizes the board to bring an action in state court against any person believed to have violated the Act, this remedy is "in addition to any other remedy." Under § 60-1432, if a franchisor enters into an additional franchise without first complying with the provisions of the Act, no license shall be is-

sued to the franchisee. I find that under these statutory provisions the board had at the very least the power to suspend or revoke the license of Dalton Buick, and at the most the powers to enforce § 60-1422, relating to additional franchises, as against General Motors. Thus, the board had the necessary powers to grant the relief requested by Kizzier in its application.

It is settled law that where an administrative body acting in a quasi-judicial capacity has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack. *Schilke v. School Dist. No. 107*, 207 Neb. 448, 451, 299 N. W. 2d 527 (1980); *Richardson v. Board of Education of School Dist. No. 100*, 206 Neb. 18, 26, 290 N. W. 2d 803 (1980); and *Christensen v. Boss*, 179 Neb. 429, 438, 138 N. W. 2d 716 (1965).

It is not disputed by the parties and it is clear that the licensing board was acting in a quasi-judicial capacity when it denied Kizzier's application. The board's fact-finding process approximated that of a court. Pursuant to § 60-1427, the board heard evidence introduced by all parties and made its decision solely upon the record, and pursuant to § 60-1428 the state rules of evidence were followed. The determination of the board on Kizzier's application closely approximated the decisional process of a court and is therefore entitled under Nebraska law to a preclusive effect. *Ohmart v. Dennis*, 188 Neb. 260, 263-264, 196 N. W. 2d 181 (1972); *Vestal, Res Judicata/Preclusion*, V-223 to V-225 (1969).³

The licensing board specifically found in its order of April 3, 1980, that the provisions of § 60-1422 are inapplicable in this case, because there was no Oldsmobile fran-

chise in the Scottsbluff community at the time General Motors entered the franchise agreement with Dalton Buick. The plaintiff cannot collaterally attack this decision. Because the statutory provisions of the section were inapplicable, General Motors did not breach the dealer agreement with Kizzier by failing to comply with those provisions.

Assuming that the above discussion relating to the preclusive effect of the board's decision is legally unsound and that Kizzier can collaterally attack the board's decision, I am nonetheless of the opinion that the licensing board's decision as to the applicability of § 60-1422 is legally correct. At the time General Motors issued the Oldsmobile franchise to Dalton Buick, S & T Motors had relinquished its motor vehicle dealer's license and the licensing board with the approval of the district court had held that there was no transfer of the Oldsmobile dealership to Kizzier and that General Motors was authorized to terminate the franchise. Because there was no Oldsmobile franchise represented in the Scottsbluff community, it was not necessary for General Motors to comply with the provisions of the Licensing Act relating to the establishment of an "additional" franchise. As discussed above, the supreme court's reversal of the orders of the board and district court did change this result. While, as held by the District Court of Scotts Bluff County, Nebraska, under equitable principles Kizzier Chevrolet may be entitled to an injunction restraining General Motors and Dalton Buick from performing in accordance with their dealer agreement until GM has made the showing set forth in § 60-1422, Kizzier is not entitled under its dealer agreement with GM to damages for breach of the contractual

agreement to comply with applicable contravening state law, for the simple reason that § 60-1422 is not applicable to the facts of this case.

Because I find that General Motors' failure to comply with § 60-1422 was not a breach of contract, Kizzier is not entitled to the damages it alleges it has suffered. Having so found, there is no need to address General Motors' contentions that Kizzier is barred by the principles of claim preclusion from suing General Motors in this court for damages for failure to comply with that section.

Kizzier has failed to succeed on any of its claims against General Motors; judgment will be entered for the defendant.

Dated December 29, 1981.

BY THE COURT

/s/ Warren K. Urbom
Chief Judge

Footnote 1/ General Motors contends that because Kizzier Chevrolet was not a party to the November 1, 1975, dealer agreement between GM and S & T Motors, Kizzier lacks standing to sue GM for violation of the Dealers Act or for a breach of that agreement. However, for the reasons stated by Magistrate Peck in filing 10 and adopted by this court by filing 11 with respect to GM's motion to dismiss, I find that Kizzier Chevrolet acceded to all rights which S & T Motors possessed under its agreement with GM and that Kizzier has standing to maintain this lawsuit for breach of that agreement.

Footnote 2/ General Motors contends that Kizzier cannot base a breach of contract claim for damages on the provisions of the Licensing Act, citing *Clemens Mobile Homes, Inc. v. Guerdon Industries, Inc.*, 199 Neb. 555, 560-561, 260 N. W. 2d 310 (1977), in support of this contention. That case is distinguishable, however, because the manufacturer in that case

(Continued on next page)

(Continued from previous page)

had not—in contrast to General Motors—made a contractual commitment to perform in accordance with the requirements of the Licensing Act whenever those requirements contravened the responsibilities and obligations of the parties as set forth in the dealer agreement. Because General Motors made this contractual commitment, Kizzier is entitled to base a breach of contract claim for damages on those provisions of the Licensing Act which contravene the terms of the dealer agreement and with which GM allegedly failed to comply.

Footnote 3/ *Baxter v. National Mortgage Loan Co.*, 130 Neb. 256, 264 N. W. 675 (1936), and *Troup v. Horbach*, 62 Neb. 564, 87 N. W. 316 (1901), cited by Kizzier Chevrolet, do not stand for the proposition that a party may be liable for damages resulting from actions taken pursuant to a court order later reversed; those cases speak only in terms of restitution.

Footnote 4/ Kizzier contends that it is entitled to damages at least from May 11, 1977, to February 28, 1978—the date of the district court order affirming the decision of the licensing board. I find, however, that the licensing board was acting in a quasi-judicial capacity when it considered and ruled upon General Motors' application, see *supra*, and that its order is therefore entitled to the same respect as a court order. Furthermore, under § 60-1415, R. R. S. Neb. (Reissue 1978), governing appeals of licensing board orders pending the final determination of the action Kizzier Chevrolet could not, except as permitted by the district court, do business as an Oldsmobile dealer. Thus, General Motors' refusal to recognize the transfer of the Oldsmobile dealership to Kizzier after the board's decision in its favor was not a breach of Nebraska law or the dealer agreement.

Footnote 5/ The judgment of the licensing board denying Kizzier's application has been appealed by Kizzier to the District Court of Lancaster County, Nebraska, and is still pending. This appeal does not, under Nebraska law, affect the finality of the board's decision for the purposes of the preclusion principles. *Kometscher v. Wade*, 177 Neb. 299, 128 N. W. 2d 781 (1964); *Creighton v. Keith*, 50 Neb. 810, 70 N. W. 406 (1897); § 25-1916, R. R. S. Neb. (Reissue 1979); Vestal, *Res Judicata/Preclusion*, V-234 (1969).

I certify this to be a true copy of the original record in my custody.

WILLIAM L. OLSON, CLERK

By /s/ Winnie B. Nichols, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV80-0-466

KIZZIER CHEVROLET COMPANY, INC. OF
SCOTTSBLUFF, NEBRASKA, and
DWAYNE KIZZIER,

Plaintiffs,

vs.

GENERAL MOTORS CORPORATION,
Oldsmobile Division,

Defendant.

JUDGMENT

(Filed December 30, 1981)

Pursuant to the accompanying memorandum,

IT IS ORDERED AND ADJUDGED that judgment
is entered for the defendant on all claims.

Dated December 29, 1981.

BY THE COURT
/s/ Warren K. Urbom
Chief Judge

Entered on the Docket December 3, 1981

William L. Olson, Clerk

By /s/ Patricia L. Nelson, Dep. Clerk

I certify this to be a true copy of the
original record in my custody.

WILLIAM L. OLSON, CLERK

By /s/ Winnie B. Nichols, Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Eighth Circuit
September Term 1982

No. 82-1484-NE

Kizzier Chevrolet Co., Inc., of Scottsbluff, Nebraska,
and Dwayne Kizzier,
Appellants,
vs.

General Motors Corporation, Oldsmobile Division,
Appellee.

Appeal from the United States District Court
for the District of Nebraska

Petition of appellant for rehearing filed in this cause
having been considered, it is now here ordered by this
Court that the same be, and it is hereby, denied.

May 18, 1983

APPENDIX D

(e) REQUESTS FOR CERTIFICATION OF LAW

24-219. Supreme Court; answer questions of law; when. The Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or a United States District Court, when requested by the certifying court, if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of this state. Such request shall not obligate the Supreme Court to accept such request for certification and the Supreme Court may, in its absolute discretion, accept or reject such request for certification as it shall in each case determine.

Source: Laws 1982, LB 724, § 1.
Effective date July 17, 1982.

24-220. Procedures; how invoked. Sections 24-219 to 24-225 may be invoked by a written request of any of the courts referred to in section 24-219 upon such court's own motion, or upon the motion to that court of any attorney involved.

Source: Laws 1982, LB 724, § 2.
Effective date July 17, 1982.

24-221. Certification request; contents. A certification request shall set forth (1) the questions of law to be answered and (2) a statement of all facts relevant to the

questions certified and showing fully the nature of the controversy in which the questions arose.

Source: Laws 1982, LB 724, § 3.
Effective date July 17, 1982.

24-222. Certification request; requirements; acceptance. The certification request shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to the Supreme Court by the clerk of the certifying court under its official seal. The Supreme Court may require the original or copies of all or any portion of the record before the certifying court to be filed with the certification order if, in the opinion of the Supreme Court, the record or portion thereof may be necessary in answering the questions. The Supreme Court shall determine whether to accept the certification request within sixty days following receipt by the court of the request. If the court fails to act on the request within sixty days of receipt, the request shall be deemed rejected.

Source: Laws 1982, LB 724, § 4.
Effective date July 17, 1982.

24-223. Certification request; fees and costs. Fees and costs shall be the same as in civil appeals docketed with the Supreme Court.

Source: Laws 1982, LB 724, § 5.
Effective date July 17, 1982.

24-224. Certification request; Supreme Court; duties.

If a certification request made pursuant to section 24-222 is accepted by the Supreme Court, it shall promptly notify the requesting court in writing of such fact and the

proceedings shall thereafter be as provided by the Supreme Court. The Supreme Court shall provide an expedited briefing and hearing process so that resolution of the accepted question may be promptly determined and justice not delayed.

Source: Laws 1982, LB 724, § 6.
Effective date July 17, 1982.

24-225. Certification request; Supreme Court opinion; delivery. The written opinion of the Supreme Court stating the law governing the questions certified shall be sent by the clerk under the seal of the Supreme Court to the certifying court and to the parties.

Source: Laws 1982, LB 724, § 7.
Effective date July 17, 1982.

APPENDIX E

60-1420. Franchise; termination; hearing. Notwithstanding the terms, provisions or conditions of any agreement or franchise, no franchisor shall terminate or refuse to continue any franchise unless the franchisor has first established, in a hearing held under the provisions of this act, that:

(1) The franchisor has good cause for termination or noncontinuance; and

(2) Upon termination or noncontinuance, another franchise in the same line-make will become effective in the same community, without diminution of the franchisee's service formerly provided, or that the community cannot be reasonably expected to support such a dealership, except that a franchisor may terminate a franchise for a particular line-make if the franchisor discontinues that line-make and a franchisor may terminate a franchise if the franchisee's license as a motor vehicle, combination motor vehicle and trailer, motorcycle, or trailer dealer is revoked pursuant to the provisions of this act.

Cross Reference

60-1421. Franchise; termination; effect. If franchisor is permitted to terminate or not continue a franchise, and is further permitted not to enter into a franchise, for the line-make in the community, no franchise shall thereafter be entered into for the sale of a motor vehicle, combination motor vehicle and trailer, motorcycle, or trailer dealer of that line-make in the community, unless the franchisor has first established, in a hearing held

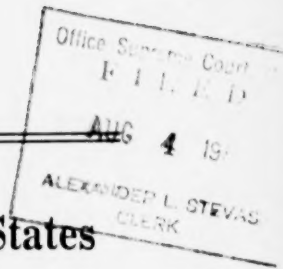
under the provisions of this act, that there has been a change of circumstances so that the community at that time can be reasonably expected to support the dealership.

Cross Reference

60-1422. Franchise; hearing; approval. No franchisor shall enter into any franchise for the purpose of establishing an additional motor vehicle, combination motor vehicle and trailer, motorcycle, or trailer dealership in any community in which the same line-make is then represented, unless the franchisor has first established in a hearing held under the provisions of this act that there is good cause for such additional motor vehicle, combination motor vehicle and trailer, motorcycle, or trailer dealership under such franchise, and that it is in the public interest.

No. 83-46

In The
Supreme Court of the United States
October Term, 1983



KIZZIER CHEVROLET CO., INC. OF SCOTTSBLUFF,
NEBRASKA, and DWAYNE KIZZIER,

Petitioners,

vs.

GENERAL MOTORS CORPORATION,
OLDSMOBILE DIVISION,

Respondent.

**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

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QUESTIONS PRESENTED FOR REVIEW

We submit that the following questions are presented by the Petition for Writ of Certiorari:

(1) Whether a federal court must certify a previously unresolved issue of state statutory construction to the state's highest court for resolution when the state's legislature has adopted a procedure whereby the state court "may in its absolute discretion, accept or reject such request for certification. . . ."¹

(2) Whether a federal court is bound to consider the issue of certification when not requested to do so by the complaining party until an adverse decision is rendered, even though that party had ample opportunity to make an earlier request.

¹See Nebraska Statute, Section 24-219, et seq., R. R. S. 1943 (1982 Cum. Supp.), contained in Petitioner's Appendix D.

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In The
Supreme Court of the United States
October Term, 1983

KIZZIER CHEVROLET CO., INC. OF SCOTTSBLUFF,
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vs.

GENERAL MOTORS CORPORATION,
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Respondent.

**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

STATUTES INVOLVED

In addition to those cited by Petitioners, Nebraska Statutes 60-1429 and 60-1430 are relevant. See our Appendix A.

STATEMENT OF THE CASE

This is a breach of contract action brought by Petitioner² against General Motors Corporation on a dealer sales and service agreement. Petitioner, a Chevrolet dealer, purchased an Oldsmobile dealership from another dealer. General Motors challenged this sale and refused to recognize it pending a resolution by the state administrative body, and courts, of whether it was required to do so under the state's Motor Vehicle Industry Licensing Act.³ General Motors prevailed before the administrative body, and the lower state court, but ultimately lost its challenge in the Nebraska Supreme Court and, therefore, recognized the transfer.

The federal District Court, as affirmed by the U. S. Court of Appeals, construed the Nebraska Licensing Act as follows:

"The provisions of the Nebraska Motor Vehicle Industry Licensing Act are geared toward preserving the status quo until the licensing board has the opportunity to consider and rule on an application. Thus in §§ 60-1420, 60-1421, and 60-1422, before a franchisor can terminate a franchise, establish a franchise once terminated, or establish an additional franchise, it must first establish in a hearing before the board good cause to do so. A similar order of priority is not specified in §§ 60-1430 or 60-1429(2). I do not read these

²Dwayne Kizzier, sole stockholder of Kizzier Chevrolet, was dismissed by the District Court as a party plaintiff, and that order was not appealed. A cause of action based on the Automobile Dealers Day in Court Act, USC, §§ 1221-1225 was also dismissed and not challenged on appeal.

³The Court relied on §§ 60-1429(2) and 60-1430 of the Act in reaching its decision. See our Appendix A for the text of those statutes.

sections as requiring that the franchisor recognize a change in franchise ownership *until* it makes the necessary showing, but rather *unless* it makes the necessary showing. With the policy of preserving the status quo in mind, I find that a franchisor is not required to give effect to a contract for a *change* of ownership until it has had the opportunity to make the necessary showing." (Emphasis the Court's.)⁴

The Court of Appeals affirmed on this issue stating:

"In sum, we defer to the district court on this issue of state law. Thus, there can be no breach of the dealer agreement by GM for failing to recognize Kizzier as the Oldsmobile dealer when GM was not obligated under state law to do."⁵

Contrary to Petitioner's statement, this state law issue was briefed and argued to the Court of Appeals.⁶

Petitioner also asserts that the Nebraska statute permitting certification of state law issues to the state courts was not effective until after the briefs were filed in the Court of Appeals. However, the Act became effective on July 17, 1982, and petitioner's Reply Brief was filed on July 30, 1982. No request for certification was made in the Reply Brief, or anytime thereafter including at oral argument. Petitioner's first request to the Court came in its Petition for Rehearing after it had lost the case.

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⁴See Petitioner's Appendix B, p. 35.

⁵See Petitioner's Appendix A, p. 14.

⁶See Appellant's Brief, pp. 10-12; Appellee's Brief, pp. 14-15; and Appellant's Reply Brief, p. 1, et seq.

ARGUMENT

There are several reasons why this case is one which the United States Supreme Court should not review on writ of certiorari.

First, it does not involve an important question of federal law which has not already been settled by this Court. In *Lehman Brothers v. Schein*, 416 U. S. 386 (1974), this Court considered the question of when it is appropriate for a United States Court of Appeals to certify an issue of state law, in a diversity case, to the highest court of the state for decision. The instant case poses no new, or different, question which has not been already answered in that case.

Second, the holding in *Lehman* would require affirmance in this case. The United States Supreme Court held that it is within the court's discretion whether to certify an issue to a state court. In the language of the Court:

"We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. It does, of course, in the long run save time, energy and resources and helps build a cooperative judicial federalism. *Its use in a given case rests in the sound discretion of the federal court.*" (Emphasis added.) 416 U. S. at 391.

The *Lehman Brothers* case was a shareholders' derivative action brought in New York. The Federal Court of Appeals reversed the district court holding, and concluded the Florida courts "would probably" allow recovery. On rehearing, the Court of Appeals denied the defendants' request that the court utilize the certification procedure under Florida law permitting decision of state law questions by the Florida Supreme Court. This Court

vacated the Second Circuit's decision and remanded it to that court so that it "may reconsider whether the controlling issue of Florida law should be certified to the Florida Supreme Court. . . ." 416 U.S. at 391-392.

It is significant that this Court did not *direct* the Court of Appeals to certify the question, but allowed it to "reconsider" its action on that issue. This was further explained by Justice Rehnquist in the concurring opinion as follows:

"The question of whether certification on the facts of this case, particularly in view of the lateness of its suggestion by petitioners, would have advanced the goal of correctly disposing of this litigation on the state law issue is one which I would leave, and I understand that the Court would leave to the sound judgment of the court making the initial choice. But since the Court has today for the first time expressed its views as to the use of certification procedures by the federal courts, I agree that it is appropriate to vacate the judgment of the Court of Appeals and remand the cases in order that the Court of Appeals may reconsider certification in light of the Court's opinion."

The Eighth Circuit Court of Appeals, in the case at bar had the benefit of the *Lehman* decision for guidance, and still exercised its discretion to deny the petitioner's belated request for certification. Its action is, therefore, consistent with *Lehman* and granting certiorari in this case would serve no useful purpose.

Third, the decisions cited by Petitioner as a basis for granting certiorari are clearly distinguishable. In *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957) and *Spector Motor Service v. McLaughlin*, 323 U.S. 101 (1944), the Supreme Court directed the Court of Appeals

to permit an interpretation of the state statute to be sought through the state court's declaratory judgment procedures. However, those cases each involved the constitutionality of the state statute. In that instance, a federal court must be careful to avoid deciding the constitutionality of the state statute when the state court may interpret it so as to avoid the issue entirely. As this Court in *Leiter* stated, quoting from *Spector*:

" . . . as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law." 352 U. S. at 228-229.

The constitutionality of the Nebraska Motor Vehicle Industry Licensing Act has never been challenged in this case. The issue is, therefore, merely one of state law, and the public policy factor as expressed in the *Leiter* and *Spector* decisions is not involved. The Eighth Circuit properly exercised its discretion in refusing to certify the issue to the Nebraska Supreme Court.⁷

Fourth, we submit that the question presented for review was not properly raised below. Petitioner requested that the state law issue be certified to the State Court *after* it discovered that the Eighth Circuit Court of Appeals ruled against it. While the Nebraska state law permitting

⁷This controversy has already been to the Nebraska Supreme Court twice. The Nebraska Court dismissed the second case as an attempt by Kizzier to collaterally attack an earlier decision by the administrative board. Judge Bright noted, in the 8th Circuit's opinion, that the Supreme Court had an opportunity to consider a related issue, which might provide some guidance in this case, but decided not to reach it. See Petitioner's Appendix A, pp. 13-14.

certification did not become effective until July 17, 1982, this was before Petitioner's Reply Brief was filed, and long before oral argument on February 14, 1983. Under these circumstances, we contend that Petitioner has waived this issue.

Finally, other meritorious arguments were presented below by General Motors Corporation. Even if the state law issue of statutory construction were certified to the Nebraska Supreme Court, and it ruled in Petitioner's favor on that issue, General Motors Corporation could still prevail on another independent ground approved by the District Court.⁸ As the Eighth Circuit observed in arriving at its ruling:

"Because we base our decision on this issue on the District Court's Ruling that a franchisor, under Nebraska Law, is not required to recognize immediately a change in ownership of a franchise, we need not reach the District Court's application of equitable principles as a bar to Kizzier's claim for damages."

Therefore, certification could become a moot issue, and simply result in needless delay.

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⁸See District Court's Opinion, Petitioner's Appendix B, pp. 30-34.

⁹See Court of Appeals' Opinion, Footnote 4, Petitioner's Appendix A, p. 12.

CONCLUSION

For the foregoing reasons, and each of them, Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

GENERAL MOTORS CORPORATION,
Oldsmobile Division, Respondent

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APPENDIX A

60-1429. *Franchise; termination, discontinuance; not valid provisions.* Notwithstanding the terms, provisions or conditions of any agreement or franchise, the following shall not constitute good cause for the termination or non-continuation of a franchise, or for entering into a franchise for the establishment of an additional dealership in a community for the same line-make:

(1) The sole ~~fact~~ that franchisor desires further penetration of the market;

(2) The change of ownership of the franchisee's dealership or the change of executive management of the franchisee's dealership, unless the franchisor, having the burden of proof, proves that such change of ownership or executive management will be substantially detrimental to the distribution of franchisor's motor vehicle, combination motor vehicle and trailer, motorcycle, or trailer products in the community; or

(3) The fact that the franchisee refused to purchase or accept delivery of any motor vehicle, combination motor vehicle and trailer, motorcycle, or trailer or vehicles, parts, accessories or any other commodity or service not ordered by the franchisee.

Source: Laws 1971, LB 768, § 29.

60-1430. *Franchise; provisions or conditions changing.* Notwithstanding the terms, provisions or conditions or any agreement or franchise, subject to the provisions of subdivision (2) of section 60-1429, in the event of the sale or transfer of ownership of the franchisee's dealership by sale or transfer of the business or by stock trans-

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fer or in the event of change in the executive management of the franchisee's dealership the franchisor shall give effect to such a change in the franchise unless the transfer of the franchisee's license under this act is denied or the new owner is unable to obtain a license under this act as the case may be.

Source: Laws 1971, LB 768, § 30.

No. 83-46

Office - Supreme Court, U.S.
FILED

AUG 17 1983

ALEXANDER L. STEVAS,
CLERK

In The
Supreme Court of the United States
October Term, 1983

KIZZIER CHEVROLET CO., INC. of SCOTTSBLUFF,
NEBRASKA, and DWAYNE KIZZIER,

Petitioners,

vs.

GENERAL MOTORS CORPORATION,
OLDSMOBILE DIVISION,

Respondent.

**SUPPLEMENT TO
BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO COMPLY WITH RULE 28.1**

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LISTING

Rule 28.1 of the Revised Rules of the Supreme Court of the United States provide, in part:

"Any document, except a joint appendix or a brief *amicus curiae* filed by or on behalf of one or more corporations shall include a listing naming all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each such corporation."

General Motors Corporation has previously filed a brief in opposition to a writ of certiorari, which brief did

not contain the listing required by Rule 28.1. Accordingly, this Supplement is tendered to comply with that Rule.

A. *Subsidiaries and their Associated Companies.*
Subsidiaries of General Motors are:

General Motors Acceptance Corporation and
General Motors of Canada Limited

Associated Companies of GMAC are:

Banque de Credit General Motors
Paris, France (78.5% owned by GMAC)

General Motors Bankgesellschaft m.b.H.
Vienna Austria (74% owned by General
Motors
Austria Beteiligungsgesellschaft m.b.H.)

Isuzu Motors Finance Co. Ltd.
Tokyo, Japan (51% owned by GMAC)

Paramount Acceptance Corporation
Manila, Philippines (40% owned by GMAC)

Transfin (Proprietary) Limited
Johannesburg, South Africa
(24.9% owned by GMAC Aouth
Africa (Proprietary) Limited)

B. *Affiliated or Associated Companies of General
Motors Corporation in the United States:*

GMFANUC (GMF) ROBOTICS
CORPORATION
5600 New King Street
Troy, Mich. 48098

- C. *Affiliated or Associated Companies and Operations of General Motors Corporation outside of the United States and Canada include:*

AUSTRALIA

General Motors-Holden's Limited
Box 1714 G. P. O.
Melbourne, Australia 3001

AUSTRIA

General Motors Austria GES.M.B.H.
Gross Enzerdorfer Strasse 59
A-1220 Vienna, Austria

BELGIUM

General Motors Continental N.V.
Noorderlaan 75
Postbus 9
B-2030 Antwerp, Belgium

BRAZIL

General Motors Do Brasil S.A.
P.O. Box 8200
01000 Sao Paulo, Brazil

CHILE

General Motors Chile S.A.
P.O. Box 14370
Santiago, Chile

COLOMBIA

Fabrica Colombiana De Automotores S.A.
("Colmotores") (77.4% owned)
Apartado Aereo 7329
Bogota 1, Columbia

DENMARK

General Motors Danmark
Borgmester Christiansens Gade 40
DK-2450 Copenhagen SV, Denmark

ECUADOR

Autos Y Maquinas Del Ecuador S.A.

("AYMESA") (36.95% owned)

Quito, Ecuador

Omnibus BB Transportes S.A. (22% owned)

Quito, Ecuador

EGYPT

General Motors Egypt, S.A.E. (31% owned)

Cairo, Egypt

FINLAND

Suomen General Motors Oy

Kutojantje 8

02630 Espoo 63, Finland

FRANCE

General Motors France

56/68 Avenue Louis Roche

92231 Gennevilliers Cedex, France

GERMANY

Adam Opel AG

D-6090 Russelsheim

Federal Republic of Germany

Convesco Vehicle Sales GmbH

Postfach 1665

D-6090 Russelheim

Federal Republic of Germany

Kabelwerke Reinshagen GmbH

56 Wuppertal 21

Federal Republic of Germany

GREECE

General Motors Hellas, A.B.E.E. (Athens)

P.O. Box 20

Amaroussion
Attica, Greece

IRELAND

General Motors Distribution Ireland Limited
Belgard Road
Tallaght, County Dublin
Republic of Ireland

Packard Electric Ireland Limited
Airton Road
Tallaght, County Dublin
Republic of Ireland

ITALY

General Motors Italia S.p.A.
Piazzale Dell Industria, 40
100144 Rome, Italy

JAPAN

Isuzu Motors Limited (34.2% owned)
Tokyo, Japan

Suzuki Motor Company, Ltd. (5.3% owned)
Hamamatsu, Japan

GM Allison Japan Limited (50% owned)
Tokyo, Japan

KENYA

General Motors Kenya Ltd. (49% owned)
Nairobi, Kenya

KOREA

Daewoo Motor Co., Ltd. (50% owned)
Seoul, Korea

LUXEMBOURG

General Motors Luxembourg Operations S.A.
Route de Luxembourg

4901 Bascharage, P.O. 29
Grand Duchy of Luxembourg

MEXICO

Aralmex, S.A. De C.V. (40% owned)
Guadalajara, Mexico

Moto Diesel Mexicana, S.A. De C.V.
(40% owned)

Aguascalientes, Mexico

General Motors De Mexico, S.A. De C.V.
Apartado 107-BIS
Mexico 1, D.F.

THE NETHERLANDS

General Motors Continental, S.A. Nederland
P.O. Box 5061
3008 AB Rotterdam, The Netherlands

NEW ZEALAND

General Motors New Zealand Limited
Trentham Plant No. 1 Private Bag
Upper Hutt, New Zealand

NORWAY

General Motors Norge A/S
Post Box 205
2001 Lillestrom, Norway

PHILIPPINES

General Motors Pilipinas, Inc. (60% owned)
P.O. Box 1478
Makati Commercial Center
Metro Manila, Philippines 3117

PORTUGAL

General Motors De Portugal, Limitada
P.O. Box 8115
1802 Lisbon Codex, Portugal

CABLESA-Industria De Componentes Electricos
Limitada
Tapada Nova
Linho, 2710 Sintra, Portugal

INLAN-Industria De Componentes
Mecanicos, Lda.
P.O. Box 40
7400 Ponte de Sor, Portugal

SINGAPORE

Regional Parts Distribution Center
15 Benoi Sector
Jurong Town, Singapore 2262

GM Singapore Pte. Ltd.
501 Ang Mo Kio Industrial Park
Singapore 2056

SOUTH AFRICA

General Motors South African (Proprietary)
Limited
P.O. Box 1137
Port Elizabeth 6000, South Africa

SPAIN

General Motors Espana, S.A.
Poligono de Entrerrios
Figueruelas (Zaragoza) Spain

General Motors Componentes, S.A.
Poligono el Trocadero
Puerto Real (Cadiz) Spain

Unicables, S.A. (51% owned)
% Kabelwerke Reinshagen GmbH
56 Wuppertal 21
Federal Republic of Germany

SWEDEN

General Motors Nordiska AB
 Armaturvaegen 4
 S-136 82 Handen, Sweden

SWITZERLAND

General Motors Suisse S.A.
 Salzhausstrasse 21
 CH-2501 Bienne, Switzerland

TUNISIA

Industries Mecaniques Maghrebines
 (20% owned)
 Tunis, Tunisia

UNITED KINGDOM

Vauxhall Motors Limited
 P.O. Box 3
 Kimpton Road, Luton
 Bedfordshire LU2 OSY, England
 Bedford Commercial Vehicle Division
 P.O. Box 3
 Kimpton Road, Luton
 Bedfordshire LU2 OSY, England

URUGUAY

General Motors Uruguay S.A.
 Avva Sayago 1385
 Montevideo, Uruguay

VENEZUELA

General Motors De Venezuela C.A.
 Apartado 666
 Caracas 1100, Venezuela
 Compresores Delfa, C.A. (49% owned)
 Caracas, Venezuela

YUGOSLAVIA

Industrija Delova Automobila, Kikinda
(49% owned)
Kikinda, Yugoslavia

Respectfully submitted,

GENERAL MOTORS CORPORATION,
OLDSMOBILE DIVISION, Respondent

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